UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MALIK L. BROWN,

Plaintiff,

-against-

21 Civ. 214
Decision

STEPHEN URBANSKI, et al.,

Defendants.

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United States Courthouse
White Plains, New York

March 15, 2022

THE HONORABLE CATHY SEIBEL,
District Judge

MALIK L. BROWN
Pro Se

MARIA B. HARTOFILIS
Attorney for Defendants

THE DEPUTY CLERK: Judge, this matter is Brown v. Urbanski. We have on the line the plaintiff, Mr. Malik Brown, we have on representing defendants from New York State Office of the Attorney General, Ms. Maria Barous Hartofilis. Our court reporter, Angela, is on, and Andy is on.

THE COURT: All right, I'm prepared to rule on the motion to dismiss. Does anybody have anything to add that's not covered by the papers?

MS. HARTOFILIS: No, your Honor. Good morning.

MR. BROWN: I feel like -- good morning, by the way.

THE COURT: Same to you.

MR. BROWN: I feel like I have stated -- I feel like I stated my case in the best possible way, and I'm feeling really confident about your decision.

THE COURT: All right, well, let me get to it. It's going to take a while because there are a lot of different claims and different defendants, so you may want to take notes.

Defendants have moved to dismiss the complaint. For purposes of the motion, I accept as true the facts, although not the conclusions, set forth in the original complaint, which is ECF number 2, the amended complaint, which is ECF number 30, which I'm going to call the AC, plaintiffs memorandum in opposition to the motion, which is ECF number 37, which I'm going to call plaintiff's opposition, and ECF number 39 which is plaintiff's sur-reply. *See Voltaire v. Westchester County*,

2016 WL 4540837 at *3 (S.D.N.Y. August 29, 2016), which says a court is allowed to consider factual allegations from a *pro se* plaintiff's preceding complaints in order to supplement those in amended complaints, *Washington v. Westchester*, 2015 WL 408941 at *1, n.1 (S.D.N.Y. January 30, 2015), which likewise says a court can consider facts from a *pro se* plaintiff's original complaint, even if they haven't been repeated in the amended complaint. And *Braxton v. Nichols*, 2010 WL 1010001 at *1 (S.D.N.Y. March 18, 2010) which says allegations in a *pro se* plaintiff's memorandum of law where they're consistent with those in the complaint can also be considered on a motion to dismiss.

My chambers will send Mr. Brown copies of any unpublished decisions I cite today.

I do note that under my individual rules of practice sur-replies are not permitted without prior permission. Plaintiff's sur-reply was filed without permission, but I will nevertheless consider the allegations in the sur-reply in light of the special solicitude with which *pro se* submissions are to be treated. It would be a waste of time to disregard those allegations, because if I were to do so, I would then have to let plaintiff amend and we'd be right back where we started. But plaintiff is now on notice and going forward I will not consider sur-replies or other unauthorized submissions. *See Nichols* and *also Guity v. Uniondale*, 2017 WL 9485647 at *7

(E.D.N.Y. February 23, 2017) *report and recommendation adopted* 2017 WL 1233846 (E.D.N.Y. March 31, 2017).

I likewise, in addition to considering these submissions, consider any documents attached to them. *See Kleinman v. Elan*, 706 F.3d 145, 152. So based on all those sources, the facts, taking plaintiff's allegations as true, are as follows.

Plaintiff is incarcerated in the custody of New York State Department of Corrections and Community Supervision, or DOCCS. During the events relevant to the lawsuit, he was held a Fishkill Correctional Facility in Beacon.

On June 14, 2020, while in the keep-lock recreation yard at Fishkill, another inmate assaulted plaintiff causing a number of injuries. I note the plaintiff doesn't state his attacker's name, and some of the records he submitted redact this person's name. Plaintiff submitted a document with his opposition papers that appear to be someone's notes on surveillance footage showing the assault. That's in plaintiff's opposition at page 3, and plaintiff says these notes were obtained by PLS. He doesn't explain what that is, but it may be an acronym for prison legal services. Those notes refer to the inmate who assaulted plaintiff as Mr. Collins, and I will use that name for the assailant throughout this opinion.

At the time of the assault on June 14, 2020,

plaintiff was serving a disciplinary sentence in the Special Housing Unit or SHU. He alleges that while in the SHU he was denied an hour of unrestrained recreation time, then he says he was only given outdoor recreation time while in mechanical restraints, which he states occurred in an overcrowded keep-lock yard in the baking sun with limited bathroom and water breaks. Pages 6 and 7 of the AC. And those are the numbers generated by the court's electronic case filing system.

Plaintiff characterizes Collins as a "known violent inmate" with an "extreme history of violence" at Fishkill. That's the complaint at 8 and the AC at 7. He alleges that Collins was in the box at Fishkill due to an assault on a corrections officer. That's in his opposition at 1. He also alleges that he and Collins have had past issues, complaint at 6, but does not explain the nature of these issues, whether he ever reported them to anyone or the specifics of any past violent incidents involving Collins beyond the detail that one incident allegedly involved an attack on the CO.

Plaintiff alleges that on the date of the attack, he and Collins, along with other inmates, were brought to the yard in mechanical restraints, including waist chains. Complaint at 6. Collins' waist chains were not properly secured and he was able to slip out of them and roam the yard for about ten minutes. Complaint at 6 to 8, plaintiff's opposition at 3. After which he assaulted plaintiff. Amended complaint at 6.

Collins struck plaintiff at least 13 times with the lock and chain of his unsecured waist restraint. Complaint at 6. AC at 6. Plaintiff's opposition at 3.

The surveillance video notes incorporated into plaintiff's opposition memorandum allege that the surveillance footage shows the following: At around 9:18 a.m. Collins walks away from a crowd of other on inmates and then "appears to be straightening his arms in a downward motion" and "bends over and appears to be doing something with his arms," after which he "stands up, turns around, and with his arms relaxed, walks back" to where he had been standing. No officers can be seen observing these actions on the video. Ten minutes later, at around 9:28 a.m., the video allegedly shows Collins "bending over and fiddling with something in front of him" and then "pulling something up with his right hand." In the following minute there was a short verbal exchange between the plaintiff and Collins, and Collins then begins swinging the chain at plaintiff continuing to do so after plaintiff falls to the ground. The attack is ongoing about 33 seconds until corrections officers "pull Collins off of plaintiff." That's plaintiff's opposition at 3.

Five of the defendants, all DOCCS employees, were present in the yard for all or part of the attack; Sergeant Deacon and Correction Officers Yunes, DelBianco, Walsh and Minard. AC at 6-7 and 12-23. Plaintiff alleges that Yunes

stood close by during the assault and did not intervene. AC at 6. He alleges that Deacon and other correction officers watched his assault from beginning to end. In addition, he alleges that Deacon ordered DelBianco to use pepper spray and DelBianco came to plaintiff and applied pepper spray after Collins had already been subdued, which exposed plaintiff's open wounds to the pepper spray chemical. AC at 6 to 7 and plaintiff's sur-reply at 2. He alleges that Minard and Walsh, along with Deacon, had foreseen the assault. AC at 7.

After the assault, each of the above-named officers, as well as the non-party correction officer, wrote a use-of-force report, redacted copies of which are attached to the amended complaint at pages 12-23. The use-of-force reports are redacted in an apparent attempt to avoid disclosing plaintiff's attacker's name. In addition, other portions of the use-of-force report, including a section for the reporter to set forth any actions taken following the use of force, are redacted. It's not clear who made the redactions and they are not otherwise explained in the parties' submissions, but some of them appear to relate to the attacker rather than to plaintiff.

The time of the incident stated in the use-of-force report contradicts the times reported on the surveillance video notes. Each report states the assault happened at about 10:05 a.m. Deacon, Minard, and DelBianco also reported that

Collins had not yet been subdued when DelBianco used pepper spray on both Collins and plaintiff. That's at pages 15, 17, and 19. The other three officers' reports do not mention the use of pepper spray. While Deacon's report states that DelBianco applied the pepper spray towards Collins' face, DelBianco's report states that the spray "had the desired effect on both inmates."

A partially redacted copy of the DOCCS unusual incident report regarding this incident is also attached to the AC at pages 27-29. As with the use-of-force reports, the redactions in the unusual incident report are not explained. Like the use-of-force reports, the unusual incident report reflects that the incident occurred at 10:05 a.m. and Collins had not yet been subdued when DelBianco used pepper spray. The unusual incident report suggests that the pepper spray was used on plaintiff stating that the pepper spray "had the desired effect on inmate Brown." That's the amended complaint at page 28.

Plaintiff alleges he was taken to the medical unit more than 30 minutes after the attack ceased, and once there, had to wait an additional 20 minutes to be examined. AC at 8, opposition at 3. Plaintiff was examined by defendant Cebron, a nurse at Fishkill. AC at 5. He alleges he was given inadequate care and then sent to the hospital only to be returned to the Fishkill and sent on the hospital later that

night for a "unseen, untreated head wound." AC at 9. See pages 24-25. Plaintiff claims that Nurse Cebron then falsified her report to corroborate her account of the officials who responded to the assault. See pages 8-9. Plaintiff initiated this action on January 8, 2021. On May 25, defendants filed a pre-motion letter in anticipation of their motion to dismiss. On June 29 we had a conference at which I granted plaintiff leave to amend the complaint. Plaintiff filed the amended complaint on July 16 and this motion followed.

The legal standard for a motion to dismiss for failure to state a claim is well-known, it comes from *Ashcroft v. Iqbal*, 556 U.S. 662, 678 and *Bell Atlantic v. Twombly*, 550 U.S. 544. In short, the plaintiff must provide sufficient factual content to state a claim that's plausible on its face.

When defendant moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, the standard is different. A court may dismiss for lack of subject matter jurisdiction if it lacks the statutory or constitutional power to adjudicate it. In fact, it must. *Cortlandt Street Recovery Corp. v. Hellas*, 790 F.3d 411, 416-17. When jurisdiction is challenged, the party asserting jurisdiction bears the burden of showing by a preponderance of the evidence that it exists, and the court can examine evidence outside of the pleadings to make that determination. *Arar v. Ashcroft*, 532 F.3d 157, 168.

Complaints by *pro se* plaintiffs are to be examined with special solicitude, *Tracy v. Freshwater*, 623 F.3d 90, 102, interpreted to raise the strongest arguments that they suggest, *Burgos v. Hopkins*, 14 F.3d 787, 790, and held to less stringent standards than formal pleadings drafted by lawyers. *Hughes v. Rowe* 449 U.S. 5, 9. Nevertheless, "threadbare recitals of the elements of a cause of action supported by mere conclusory statements do not suffice," and district courts "cannot invent factual allegations" that the plaintiff has not pleaded. *Chavis v. Chappius*, 618 F.3d 162, 170.

The other legal standard that's relevant here relates to qualified immunity which shields a government official from liability for civil damages if either the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 *(per curiam)*; or if it was objectively reasonable for the official to believe his actions or her actions were lawful at the time. *Simpson v. New York* 793 F.3d 259, 268. The objective reasonable test is met and the defendant is entitled to immunity if officers of reasonable competence could disagree on whether the defendant's actions were legal. *Thomas v. Roach*, 165 F.3d 137, 143. Under the objective element, the Court has to look beyond generalized constitutional protection, such as the right to be free of unreasonable searches and seizures, and determine whether the

law is clearly established in a more particularized sense, given the specific factual situation with which the officers is confronted. *Kerman v. City of New York*, 261 F.3d 229, 236.

Qualified immunity entitles public officials to immunity from suit rather than a mere defense to liability and is effectively lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526. Thus, the Supreme Court repeatedly has stressed the importance of resolving immunity questions at the earliest possible stage. *Pearson v. Callahan*, 555 U.S. 223, 232. Indeed, the point of qualified immunity is to ensure that insubstantial claims against government officials will be resolved prior to discovery. *Pearson* at 231. But qualified immunity motions often fail at the motion to dismiss stage because the facts in the plaintiff's complaint do not suffice to make out the defense. *Ruffin v. Travers-Marsh,* 2018 WL 3368726 at *7 (S.D.N.Y. July 10, 2018) (collecting cases).

I'm going to start with the official capacity claims plaintiff asserts in AC at 5 that he's bringing his claims against the defendants in their official and individual capacities. But DOCCS officials enjoy Eleventh Amendment immunity from suit under Section 1983 for damages in their official capacities. *Gunn v. Bentivenga*, 2020 WL 2571015 at *3 (S.D.N.Y. 2020); *see Ortiz v. Russo*, 2015 WL 1427247 at *5 (S.D.N.Y. March 27, 2015). Suing an employee of the state in

the employee's official capacity is the same as suing the state, and that's not allowed under the Eleventh Amendment. So the claims against the defendants in their officials capacities are dismissed for lack of subject matter jurisdiction, but the claims against them in their individual capacities remain, and so I turn to the failure to protect claims against Yunes, Deacon, DelBianco, Minard and Walsh, all of whom responded to the attack.

"The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody." *Hayes v. New York City*, 84 F.3d 614, 620, citing *Farmer v. Brennan*, 511 U.S. 825, 833. To prevail on a claim that officials have failed to protect an inmate from harm, a plaintiff has to demonstrate that objectively the conditions of his incarceration posed a substantial risk of serious harm, and subjectively that the defendant acted with deliberate indifference to that risk. *Farmer* at 834, and *Hayes* at 620. "A prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm." *Hayes* at 620. A plaintiff must show that prison officials actually knew of but disregarded an excessive risk to his safety. "The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he

must also draw the inference." *Farmer* at 837*; see Tangreti v. Bachmann*, 983 F.3d at 619. Thus, to state the cognizable section 1983 claim, a prisoner must allege actions or omissions sufficient to demonstrate deliberate indifference. Mere negligence will not suffice. *Hayes* at 620.

I'm first going to discuss the failure to protect before the attack.

A plaintiff can state a failure to protect claim by alleging that he informed a prison official about a specific fear of assault and was then assaulted, but communications about generalized safety concerns or vague concerns of future assault by unknown individuals are insufficient to knowledge that an inmate is subject to a substantial risk of serious harm. *Marshall v. Griffin*, 2020 WL 1244367 at *9 (S.D.N.Y. March 16, 2020). While plaintiff broadly alleges that he had "past issues" with Collins, complaint at 6, he does not specify what those issues were, nor does he allege that he reported them to prison officials, much less if he reported a specific fear of assault that would have put any defendant on notice of a substantial risk to his safety.

But alternatively a plaintiff can state a claim based on a failure to protect him against a general risk of harm to all inmates in the facility by alleging that the defendants knew of a history of prior inmate-on-inmate attacks similar to the one suffered by the plaintiff and that the measures they

should have taken in response to those prior attacks would have prevented the attack on the plaintiff. *Parris v. DOCCS*, 947 F.Supp.2d 354, 363 (S.D.N.Y. 2013); *see Bladon v. Aitchison*, 2019 WL 12067370 at *7 (S.D.N.Y. March 14, 2019). This generally requires the plaintiff to establish a "longstanding, pervasive, well-documented history of similar attacks, coupled with circumstances suggesting that defendant official being sued had been exposed to this information." *Stephens v. Venettozzi*, 2016 WL 929268 at *21, (S.D.N.Y. February 24, 2016), *report and recommendation adopted*, 2016 WL 1047388 (S.D.N.Y. March 10, 2016).

Plaintiff alleges that his attack was a "known violent inmate," AC at 6, who previously attacked a correction officer and had "an extreme history of violence" in the prison. Opposition at 1. But saying the attacker was generally violent does not suffice. Some prisoners are violent people and may act out in prison, but it is not practical to segregate all such people, and accordingly, the law requires a plaintiff to plausibly allege a history of similar attacks and a way the attack in question could reasonably have been prevented. Here, plaintiff does not describe any prior inmate-on-inmate attacks at all by Collins or anyone else, let alone any similar to the one suffered by him on June 14, 2020. Nor does he provide facts showing that any individual defendant was aware of any such attacks or suggest what measures should have been taken in

response. *See Coronado v. Goord*, 2000 WL 1372834 at *6, (S.D.N.Y. September 25, 2000) which said a general allegation of prior violence insufficient to show knowledge of a risk where no details were provided as to the type or level of violence or whether it was similar enough to put the defendants on notice.

Nor does plaintiff allege that any defendant knew that Collins had removed his waist chain. Plaintiff alleges that Collins was allow to roam the yard without his waist chain, AC at 6 and 8, but he does not allege that any defendant actually knew that Collins had removed his waist chain. The surveillance video notes that Collins can be seen from behind doing something with his arms and bending over, but those observations do not allege that even if an official was observing Collins it was clear that he was removing his waist chain. Moreover, the video notes say that no COs can be seen from the camera's perspective observing Collins. And while plaintiff alleges vaguely that Minard, Walsh, and Deacon had foreseen the assault, this allegation is entirely conclusory. Plaintiff does not allege that any officer saw Collins remove his waist restraint or noticed that it had been removed before the assault began.

In short, while the officers in the yard should have seen that Collins was unrestrained if they had been paying attention, there are no facts suggesting that their failure to

pay attention was deliberate. There is no allegation that defendants' apparent failure to recognize the potential harm here, in other words, that Collins had slipped out of his waist chain, was anything other than negligent. As plaintiff himself states in his amended complaint, "For over ten minutes my attacker roamed the KL yard with no waist chain. How do you miss that?" AC at 8. That allegation amounts to an allegation of negligence or dereliction of duty, not of willful and knowing disregard of a specific threat. *See Farmer* at 838 where the court said that an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment under the Eight Amendment. Likewise, the fact that officials may have been negligent in failing to secure Collins' restraint does not suffice, *see Hayes* at 620, which points out that negligence is in sufficient.

Plaintiff's complaint thus lacks allegations that any prison official knew of and disregarded a substantial risk of serious harm to plaintiff during his attack. To the contrary, the facts plaintiff provides suggest a surprise attack, which is insufficient to support a deliberate indifference claim. *See e.g. Rivera v. Royce*, 2021 WL 2413396 at *8 (S.D.N.Y. June 11, 2021)(collecting cases). I've concluded the subjective prong is not met, so I need not address the objective prong. *Marshall*, at 2. Accordingly, the

failure-to-protect claim based on defendant's conduct before the assault is dismissed.

I now turn to failure-to-protect during the assault.

Plaintiff alleges that Yunes failed to intervene and left him to fend for himself once the attack started. AC at 6. He further alleges that Deacon, Minard, and Walsh were in sight of the assault from beginning to end and failed to properly intervene. AC at 6 and complaint at 6. "In the context of a failure-to-intervene claim, an officer displays deliberate indifference when he has adequate time to assess a serious threat against an inmate and a fair opportunity to protect the inmate without risk to himself, yet fails to intervene." *Henry v. County of Nassau*, 2015 WL 2337393 at *7 (E.D.N.Y. May 13, 2015). The law in this circuit is clear that officers are under no obligation to put their safety at risk by intervening in inmate fights. *Velez v. City of New York*, 2019 WL 3495642 at *5, (S.D.N.Y. August 1, 2019). Where an inmate-on-inmate fight is not long enough that an officer present at the scene would have had a reasonable opportunity to attempt to prevent the attack from continuing, a plaintiff can't establish a section 1983 failure to intervene claim. *Henry* at 7.

First, plaintiff seems to allege that at the outset of the attack Yunes was nearby but alone. Yunes' failure to intervene before other officers were on hand does not reflect deliberate indifference because "it is well established that a

failure to intervene in an inmate-on-inmate assault is not actionable if, in so doing, an officer would have subjected himself or others to harm. *Rosario v. Nolan*, 2021 WL 2383769 (W.D.N.Y. March 22, 2021) *report and recommendation adopted*, 2021 WL 2380818 (June 10, 2021). *See Blaylock v. Borden*, 547 F.Supp 2d. 305, 312 (S.D.N.Y. 2008), which said it was reasonable for an officer who was alone with two inmates, one of whom had a weapon, to call for backup instead of jumping into the fight himself, *aff'd* 363 F.App'x 786, and *Velez-Shade v. Population Management*, 2019 WL 4674768 at *6 (D. Conn. September 25, 2019), which granted a motion to dismiss where a lone officer waited two minutes until backup arrived to intervene in an altercation involving three inmates.

Second, the video notes on which plaintiff relies reflect that just over 30 seconds elapsed between the time at which Collins began swinging the waist chain at plaintiff and the time at which officers pulled Collins off of plaintiff. Plaintiff's opposition at 3. This belies plaintiff's suggestion that the prison officials named in his complaint delayed in intervening or stood by as the attack was ongoing. *See Ewers v. City of New York*, 2021, WL 2188128 at *7 (S.D.N.Y. May 28, 2021) finding no failure to protect when officers arrived within seconds to break up a fight, and *Henry* at 7, finding no failure to intervene where the fight lasted one-to-two minutes.

Accordingly, plaintiff's failure-to-protect claim bassed on defendants' conduct during the assault is dismissed.

I next turn to excessive force.

Plaintiff advances excessive force claims on Deacon and DelBianco, alleging that in the wake of the attack in which plaintiff was the victim, DelBianco pepper-sprayed him on Deacon's orders, AC at 7, after plaintiff's attacker had already been subdued. Plaintiff's sur-reply at 2.

An Eighth Amendment excessive force claim generally requires a subjective and objective showing. "The subjective component of the claim requires a showing that the defendant had the necessary level of culpability shown by actions characterized by wantonness in light of the particular circumstances surrounding the challenged conduct. For excessive force claims, as contrasted with other actions or inactions that rise to the level of Eighth Amendment violations, the test for wantonness is whether the force was used in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm.

To determine whether defendants acted maliciously or wantonly, the Court must examine several factors, including the extent of the injury and the mental state of the defendant, as well as the need for the application of force, the correlation between that need and the amount of force used, the threat reasonably perceived by the defendant and any efforts made by

the defendants to temper the severity of a forceful response.

Accordingly, determining whether officers used excessive force necessarily turns on the need for the force used. *Harris v. Miller*, 818 F.3d 49 at 63.

The objective inquiry looks to whether the conduct was objectively harmful enough or sufficiently serious to reach constitutional dimensions, an inquiry that is context specific and turns on contemporary standards of decency. *Harris* at 64. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated. The objective element is satisfied in the excessive force context even if the victim does not suffer serious or significant injury, as long as the amount of force used is not minimal. *Harris* at 64. But the extent of the injury suffered is relevant to the Eighth Amendment inquiry insofar as it indicates the amount of force applied. *Rodriguez v. City of New York*, 802 F.Supp. 2d 477, 481 (S.D.N.Y. 2011).

The use of pepper spray constitutes a significant degree of force. *Tracy* at 98. While "deployment of a chemical agent is an accepted means of controlling an unruly or disruptive inmate," *Jones v. Wagner*, 2020 WL 4272002 at *3 (D. Conn. July 24, 2020), use of pepper spray is impermissible where it is deployed "in greater quantities than necessary or for the sole purpose of punishment or infliction of pain." *Vazquez v. Spear*, 2014 WL 3887880 at *5 (S.D.N.Y. August 5,

2014); *see Jones* at 3 where the court said "A constitutional violation can occur when a use of a chemical agent is malicious.

Numerous courts in this circuit have held that the use of pepper spray against an incarcerated individual who is neither resisting nor posing a threat to correction officers is a viable ground for an excessive-force claim. *See Johnson v. Schiff*, 2019 WL 4688542 at *19 (S.D.N.Y. September 26, 2019), which said "while the use of a single burst of a chemical agent which is not a dangerous quantity is a constitutionally acceptable means of controlling an unruly or disruptive inmate. Here, plaintiff squarely alleges that he was fully cooperative, that defendants were on the other side of the cell bars and thus not plausibly in danger and that the pepper spray was intentionally sprayed directly into plaintiff's eyes and face an onto his hair causing him excruciating pain that lasted for two weeks." *See also Pena v. Aldi*, 2019 WL 2193465 at *2 (D. Conn. May 21, 2019) finding a plausible excessive-force claim where the officers pepper sprayed an inmate in the face who had just been involved in a fight but was handcuffed. *Solek v. Naqvi*, (D. Conn. December 23, 2016), which denied a motion to dismiss where the plaintiff alleged that the defendant sprayed the chemical agent after the plaintiff was handcuffed and not resisting. *Lang v. Zurek*, 2018 WL 6069468 at *5 (N.D.N.Y. October 17, 2018), which denied the motion to dismiss even

though the complaint suggested plaintiff may have precipitated the use of force by his refusal to return to his cell and his subsequent attempt to run, but there was no indication as to the length, amount, or proximity of the pepper spray deployment, *report and recommendation adopted*, 2018 WL 6068416 (November 20, 2018); *Wunner v. Smith*, 2022 WL 161463 (S.D.N.Y. January 18, 2022), where a pre-trial detainee stated a claim where he was pepper-sprayed multiple times while pleading for help and not actively resisting, and *Taylor v. Quayyum*, 2021 WL 6065743 at *5 (S.D.N.Y. December 21, 2021), finding a claim stated where the pre-trial detainee plausibly alleged that the officer pepper-sprayed the plaintiff merely because the plaintiff had cursed at the officer not because there was a security issue. And *also see Tracy* at 99 which found a reasonable juror could find the use of pepper spray inches away from the face of a defendant already in handcuffs and not actively resisting could be an unreasonable use of force.

While the defendants here were responding to an assault by an armed inmate, unquestionably giving them reasonable concern for their own safety and that of other inmates while the attack was ongoing, plaintiff alleges that DelBianco came to him and applied pepper spray after that armed inmate had been subdued, plaintiff's sur-reply at 2, and that Deacon ordered the use of force against him. AC at 6 to 7. This occurred in the wake of an apparently vicious attack in

which plaintiff asserts he was "always the victim," AC at 7, from which I infer the plaintiff was not himself a risk to the officers. Defendants point to the surveillance video notes which indicate plaintiff was kicking at Mr. Collins as evidence the plaintiff was fighting back and, thus, the use of pepper spray on both inmates was reasonable to restore order. They make that argument at ECF number 38 at page 6. But the video notes only indicate that plaintiff was kicking his legs in self-defense while Collins was attacking him. Plaintiff's allegation that the use of pepper spray came later after Collins was subdued. Sur-reply at 2. Thus, the disturbance on which defendants rely had, according to plaintiff, already subsided.

The video may show exactly when the pepper spray was used and what plaintiff was doing, if anything, at the time and it or other evidence may show at summary judgment or trial that Deacon's order and DelBianco's conduct were reasonable given the circumstances, but I must take plaintiff's allegations as true at this stage. The allegations that Collins was already subdued as DelBianco pepper-sprayed plaintiff on Deacon's orders render it plausible that the pepper spray was deployed and the order given to cause harm rather than in a good faith effort to maintain or restore discipline.

Defendants argue they are nonetheless entitled to qualified immunity. For qualified immunity to bar suit at the

motion to dismiss stage, not only must the facts supporting the defense appear on the face of the complaint, but as with all 12(b)(6) motions, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim but also those that defeat the immunity defense. *Vann v. Fischer*, 2012 WL 2384428 at *10 (S.D.N.Y. June 21, 2012); *see Hyman v. Abrams*, 630 F.App'x 40, 42, which noted that usually qualified immunity cannot support the grant of a 12(b)(6) motion. As I've just discussed, a gratuitous and unjustified use of pepper spray against a plaintiff who is not resisting is a constitutional violation. *See Tracy* at 98 at n.5. At this stage, I cannot say it would have been objectively reasonable for DelBianco to believe it was lawful for him to approach and pepper-spray the victim of an assault after the assaulter was already subdued, and the victim presented no risk of harm, or for Deacon to order that action. And I must credit these allegations at this stage, so it's premature to determine that they're entitled to qualified immunity.

So the motion to dismiss the excessive force claim against Deacon and DelBianco is denied.

I then turn to deliberate indifference based on medical care.

Plaintiff alleges this claim against Cebron for what he asserts was inadequate medical care after the attack. AC at

8 to 9.

The Eighth Amendment imposes a duty on prison officials to ensure that inmates receive adequate medical care. *See Farmer*, 832. But not every lapse in medical care is a constitutional wrong. Rather, a prison official violates the Eighth Amendment only when two requirements are met, one objective one subjective. *Salahuddin v. Goord*, 467 F.3d 263, 279.

First the prisoner must allege he was actually deprived of adequate medical care as the official's duty is only to provide reasonable care, *Salahuddin* at 279, and that the alleged deprivation of medical treatment was sufficiently serious. That is, the prisoner must prove that his medical need was a condition of urgency, one that may produce death, degeneration or extreme pain. *Johnson versus Wright*, 412 F.3d 398, 403; *see Williams v. Raimo*, 2011 WL 6026115 at *3 (N.D.N.Y. July 22, 2011) noting there's no litmus test for deciding whether a condition is sufficiently serious, but a court can look at, among other things, whether the impairment is one that a reasonable doctor would find important and worthy to treat, whether the condition affects the individual's daily life, and whether it causes chronic and substantial pain.

Where a plaintiff's medical indifference allegations amount to a delay in treatment, it's appropriate to focus on a challenged delay rather than the underlying condition alone in

analyzing whether the alleged deprivation is objectively serious enough to support an Eighth Amendment claim. *Ray v. Zamilus* 2017 WL 4329722 at *9 (S.D.N.Y. September 27, 2017). On the one hand, a defendant's delay in treating an ordinarily insignificant medical condition can become a constitutional violation if the condition worsens and creates a substantial risk of harm, but on the other hand, delay in treating a life-threatening condition may not violate the Eighth Amendment if the lapse does not cause any further harm beyond that which would occur even with complete medical attention. *Ray* at 9; *see Pabon v. Wright*, WL 628784 at *8. (S.D.N.Y. March 29, 2004), "A delay in treatment does not violate the Constitution unless it involves an act or failure to act that evinces a conscious disregard of a substantial risk of serious harm...The Second Circuit has reserved such a classification for cases in which, for example, officials deliberately delayed medical care as a form of punishment, ignored a life-threatening and fast-degenerating condition for three days or delayed major surgery for over two years."

Second, the inmate must allege that the charged official knew of and disregarded an excessive risk to inmate health or safety. As noted earlier, the officer must have both been aware of the facts from which the inference could be drawn that there was a substantial risk of serious harm and must have drawn the inference. *Johnson* 412 F.3d at 403, quoting *Farmer*

at 837; see *Phelps v. Kapnolas*, 308 F.3d 108, 186 (*per curiam*), which equated deliberate indifference with criminal recklessness. Neither mere disagreement over the proper treatment or medical malpractice are constitutional violations merely because the victim is a prisoner. *Estelle v. Gamble*, 429 U.S. 97, 106, and *Chance v Armstrong*, 143 F.3d 698, 703. Rather, to state an Eighth Amendment deliberate indifference claim, an inmate must show that the defendants acted or failed to act while actually aware of the substantial risk that serious harm would result. *Farid v. Ellen*, 593 F.3d 233, 248. Prison officials may be found free from liability if they responded reasonably to the risk even if the harm was not averted. *Farmer* at 844.

Plaintiff's allegations against Cebron failed to satisfy the standards. First, while plaintiff alleges that his initial treatment was delayed by about an hour, he does not allege that this delay caused his condition to worsen in any significant way nor does he allege that it was Cebron who caused this delay in treatment. Second, he alleges that he has an unseen, untreated head wound that caused him to be returned to the outside hospital but he also does not describe any serious harm caused by delay in treatment of that wound.

He also failed to allege any facts from which I could infer that Cebron acted with sufficiently culpable intent. His head wound was unseen and untreated until the second time he

went to the hospital. That multiple medical professionals, not just Cebron, but everyone who saw him during his first trip to the hospital apparently examined the plaintiff and failed to notice or address this wound indicates that it was easy to miss and Cebron's failure to treat it when she first examined was, at most, negligent, it does not rise to the level of subjective indifference necessary for an Eighth Amendment claim. *See Hogan v. Russ* 890 F. Supp. 146, 149 (N.D.N.Y. 1995). So the deliberate indifference claim against Cebron is dismissed.

I now turn to a claim regarding falsifying the report.

Defendants don't address this, but plaintiff alleges that Deacon, Yunes, DelBianco, Minard, Walsh and Cebron all falsified reports related to the June 14 attack, AC at 6-8. "Generally, a prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in a deprivation of a protected liberty interest. There are two exceptions to this general rule. An inmate has a claim where he can show either discipline without adequate due process because of a false report or that the report was in retaliation for exercising a constitutionally protected right." *Perez v. Does*, 209 F.Supp. 3d 594, 598 (W.D.N.Y. 2016) quoting *Willey v. Kirkpatrick*, 801 F.3d 51, 63. Plaintiff has not alleged that he was disciplined as a result of any of the allegedly falsified reports filed in connection with the

attack, nor has he alleged that the reports were falsified in response to his exercise of a constitutionally protected right. His allegation is that defendants deliberately falsified their reports to cover up their negligence or use of excessive force. But even if true, this conduct does not rise to the level of a constitutional violation. *See Milner v. City of Bristol*, 2019 WL 3945525 at *3 (D. Conn. August 21, 2019), which dismissed where the complaint did not allege additional facts to show that any deprivation of liberty or adverse consequences followed from the issuance of false police reports; and *Heyliger v. Gebler*, at *2 and n.1 (W.D.N.Y. July 30, 2010), which notes the Court dismissed claims alleging false reports as part of a coverup whether disciplinary or not. Odd as it may seem, there is no general constitutional right to be free from the cover-up of a past constitutional violation," and "general allegations that a party conspired to cover up a past constitutional violation are insufficient to establish liability under section 1983." *Paterson v Paterson*, 2019 WL 1284346 at *10 (W.D.N.Y. March 20, 2019).

I now turn to the conditions of confinement claim.

Plaintiff alleges that the conditions of his confinement at the time the assault occurred, and specifically the amount and type of exercise he was permitted, violated his Eighth Amendment rights. "To state an Eighth Amendment claim against a prison official based on conditions of confinement,

an inmate must allege, one, objectively, the deprivation the inmate suffered was sufficiently serious that he was denied the minimal civilized measure of life's necessities, and, two, subjectively, the defendant official acted with a sufficiently culpable state of mind such as deliberate indifference of inmate health and safety. *McCray v. Lee*, 963 F.3d 110, 117; see *Farmer* at 834.

Read liberally, plaintiff's complaint alleges that the conditions of his SHU confinement were unsafe. When a prisoner asserts a claim predicated on unsafe conditions, the court must determine whether society considers the risk of which the plaintiff complains to be so grave that it violates contemporary standards of decency to expose anyone to that risk unwillingly. *McCray* at 120, quoting *Helling v. McKinney*, 509 U.S. 25, 36. In other words, the prisoner must show the risk of which he complains is not one that today's society chooses to tolerate. *McCray* at 120. The objective element depends on both the seriousness of the potential harm and the likelihood that such injury to health will actually be caused. *Helling* at 36.

Plaintiff alleges generally that he spent 37 days under restrictions that caused him to be mechanically restrained in an overcrowded yard in the hot sun with one water break and one bathroom break in an hour 15 minute recreation period. AC at 6. While the conditions described by plaintiff

may be unpleasant, these allegations do not plausibly show that the circumstances which, aside from the mechanical restraints, are not dissimilar to those in which many people work or play, were so dangerous or the deprivation so severe, that it violates the Eight Amendment.

I next turn to deprivation of exercise.

Plaintiff alleges that for 37 days he was denied the opportunity to partake in an hour of unrestrained recreation. AC at 6.

The Second Circuit has held that some opportunity for exercise must be afforded to prisoners. *McCray* at 117 collecting cases. The deprivation of exercise amounts to a constitutional violation only where the inmate is denied "all meaningful exercise" for a substantial period of time. *Davidson v. Coughlin*, 968 F.3d 121, 129 (S.D.N.Y. 1997). In determining whether an exercise deprivation rises to this level, the court may consider the duration of the deprivation; the extent of it; the availability of other out-of-cell activities; the opportunity for in-cell exercise; and the justification for deprivation. *Williams v. Goord*, 111 F.Supp. 2d 280, 292 (S.D.N.Y. 2000).

At this stage, 37 days appears to be in the range that could be of sufficient duration to give rise to a deprivation of exercise claim. *See Williams* at 292, 293, which found 28 days without unrestrained exercise sufficient for an

Eighth Amendment claim, and *McCray v. Lee*, citing cases where other circuits held seven weeks and six-and-a-half weeks were long enough. And *Ruggiero v. Prack* (W.D.N.Y. 2016), which found 22 days to be in the category of relatively brief and not violating the Eighth Amendment. So 37 days seems like it's in the ballpark plausibly at this stage.

With regard to the extent of the deprivation, I infer from plaintiff's allegations that his only out-of-cell exercise time was an hour and 15 minutes in mechanical restraints in the keep-lock yard. AC at 6. A requirement that an inmate exercise only in full restraints may be found to infringe an inmate's right to some meaningful opportunity for exercise. *Edwards v. Arnone*, 613 F. App'x 44, 47. Second Circuit has declined to determine as a matter of law that and inmate's "ability to shuffle around in full restraints while breathing fresh air constitutes meaningful exercise." *Edwards v. Quiros*, 986 F.3d 187, 194-95. Similarly, the availability of in-cell exercise does not establish a meaningful opportunity to exercise as a matter of law. *Edwards* 194-95.

Thus, the facts plaintiff alleges here are sufficient to push his claim over the line from conceivable to plausible, even absent details from which I can analyze the final three *Williams* factors. Construing plaintiff's allegations to raise the strongest argument they suggest, and drawing reasonable inferences in his favor, I find he has plausibly alleged a

deprivation of exercise claim under the Eighth Amendment at least at this stage.

Defendants argue that Urbanski cannot be held liable for any constitutional violation because plaintiff hasn't alleged his personal involvement. It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under section 1983. *Colon v. Coughlin, 58* F.3d 865, 873. While *Colon* laid out a special test for supervisory liability, outlining five ways a plaintiff could show personal involvement of a supervisor, the Second Circuit has clarified that under *Iqbal* the *Colon* test is invalid and a plaintiff has to plead and prove that each defendant, through the official's own individual actions, has violated the Constitution. *Tangreti v. Bachmann*, 983 F.3d 609, 618. Merely being in the chain of command is insufficient. *Tangreti* at 618. While the factors necessary to establish the 1983 violation will vary with the constitutional provision at issue because the elements of different claims vary, the violation must be established against the supervisory official directly. *Tangreti* at 618.

Defendants address their personal involvement argument for Urbanski to plaintiff's broader complaints about the safety issues raised by his confinement but they do not specifically address his deprivation of exercise claim. *See* ECF number 36, 18 to 19. Urbanski is alleged to be the deputy

superintendent of security for Fiskill, AC at 4, and plaintiff alleges that he himself "issued a restraint order that deprived plaintiff of recreation," complaint at 6, and "deprived plaintiff of the right to exercise." AC at 7. Plaintiff's pleadings are somewhat confusing because he states first that Urbanski issued a restraint order, complaint at 6, and then the amended complaint at 6 that Urbanski derived him of the right to exercise without issuing any order as to why and how it became so that, as a SHU inmate, plaintiff was not entitled to an hour of unrestrained rec. I read these allegations together to mean that Urbanski ordered the restriction but failed to provide further explanation of the reasons behind it. Accepting those assertions as true at this stage, plaintiff has successfully alleged Urbanski's personal involvement in the deprivation of exercise.

Defendants also contend that Urbanski is entitled to qualified immunity arguing that because he was not personally involved he would not have known he was violating the Eighth Amendment. That's in their brief at 21 to 22. But plaintiff, giving him special solicitude, has pleaded personal involvement. Moreover, the law in the area would have been clear to a reasonable official. It is well established that the Eighth Amendment mandates that inmates be provided some opportunity for exercise, *see McCray* at 120, noting the right of prisoners for a meaningful opportunity for exercise has been

clearly established for three decades before that case which was before this one, and *Paul v. LaValley*, 712 F.App'x 78, 79, finding the right to exercise well established by 1985. It's likewise well-established that denying an inmate the opportunity to exercise without restraints can violate this principle. *Edwards v Arnone*, 613 F.App'x 47, which says that under clearly established law a reasonable juror could conclude that reasonable officers would agree that fully restraining inmates during out-of-cell exercise without an adequate safety justification is unconstitutional. There may be an adequate safety justification here, but I can't tell from the complaint that there is, and so the motion to dismiss the deprivation of exercise claim against Urbanski is denied.

Turning to Annucci.

To the extent plaintiff alleges that the claims that are dismissed above should be brought against Annucci in his supervisory capacity, those claims are dismissed because there's no supervisory liability in the absence of an underlying constitutional violation. *See Raspardo v. Carlone*, 770 F.3d 97, 129.

With respect to the surviving claims, plaintiff has not pleaded facts sufficient to establish that Anucci personally through his own actions was involved in any of the deprivations. There are no facts from which I can infer his involvement or culpability. *See Tangreti* at 618. So all

claims against Annucci are dismissed.

To the extent plaintiff advances state law claims, including negligence, those must be dismissed under New York Correction Law 24 which provides you can't sue a DOCCS employee in his personal capacity for damages arising out of acts or failures to act within the scope of his employment. That's New York Corrections Law section 24(1). That section applies to claims brought in this court. *Baker v. Coughlin*, 77 F.3d 12, 15, and therefore, plaintiff's precluded from raising state law claims in federal court against state law employees in their personal capacities for actions within the scope of their employment. *Murphy v. Spalding,* 12022 WL 294552 at *10 (S.D.N.Y. February 1, 2022); *see Davis v. McCready*, 283 F.Supp. 3d 108, 123-24 (S.D.N.Y. 2017). Defendants here were all clearly acting within the scope of their employment, so any state tort claims against them are dismissed.

Finally, as to leave to amend, it should be freely given when justice so requires under Rule 15, but it's within my discretion to grant or deny. *Kim v. Kimm*, 884 F.3d 98. Leave is properly denied for repeated failure to cure deficiencies by amendments previously allowed or for futility, among other reasons. *Ruotolo v. City of New York*, 514 F.3d 184, 191.

Plaintiff has already amended once after having the benefit of a pre-motion letter from defendants stating the

grounds on which they would move to dismiss. That's ECF number 24, as well as my observations during the pre-motion conference. Failure to fix deficiencies in the previous pleading after being provided notice of them is alone sufficient ground to deny leave to amend. *National Credit Unit v. US Bank*, 898 F.3d 243, 247-58*; in Re Eaton Vance 380* F.Supp. 2d 220, 242 (S.D.N.Y. 2005), *aff'd* 481 F.3d 110, 118.

Further, plaintiff has not asked to amend again or otherwise suggested he's in possession of facts that would cure the deficiencies identified in this opinion. And accordingly, I decline to grant leave to amend on my own motion. *See TechnoMarine v. Giftports*, 758, F.3d 493, 505*; Gallop v. Cheney*, 642 F.3d 364, 369; and *Horoshko v. Citibank*, 373 F.3d 248, 249-50.

So for these reasons the motion is granted in part and denied in part. The case will go forward against DelBianco and Deacon based on excessive force arising from the use of pepper spray and will go forward against Urbanski based on the deprivation of exercise claim.

All other claims are dismissed.

The clerk of Court should terminate motion number 35 and terminate all defendants except Deacon, DelBianco and Urbanski.

So now what happens, Mr. Brown, is discovery. That is an opportunity for each side to collect information that

they're going to want later on. What often happens in cases like this is that after discovery the defendants make what's called a motion for summary judgment, which means they ask me to toss the case out without a trial. Usually their argument is that even accepting the facts as the plaintiff described them, they're entitled to win the case. At that point, each side has to provide evidence, not just allegations like you can do in a complaint. So during the discovery phase of the case, each side collects whatever evidence it wants, and you can do that a number of ways. You can request documents from the other side. You can, if you're able to from where you are, take depositions. You're allowed to propound interrogatories, which is just -- which are just questions that the other side has to answer. You can ask witnesses to give you affidavits and, of course, the defendants can do the same thing. They'll take your deposition, I'm sure, and you can ask them for a copy of the video or other things that you want from them.

And then if they make a motion, at that point, you have to provide evidence. The evidence can be your own affidavit, it just has to be sworn or affidavits from other witnesses and the first thing you have to do is make what are called Rule 26 disclosures. Rule 26 is something you should look at. It contains a list of information that each side has to give the other right off the bat in a case. Things like what witnesses do you think you're going to rely on? What

sorts of documents do you think you're going the rely on? Each side has to provide that to the other so that the other can decide what further documents to request, what witnesses to depose and that kind of thing.

So the Rule 26 disclosures will be due in two weeks time. So you should send that -- that doesn't come to the court, that goes directly to the Attorney General. And you've got to make sure you include everything you might want to use at trial because, if you put in your Rule 26 disclosures the names of three witnesses, let's say, and then at trial you want to call someone else, you're going to be precluded because you never notified the defense that you want to call that person.

So even after you make your Rule 26 disclosures, if you decide that there are additional documents or witnesses, you have to keep supplementing your Rule 26 disclosures, otherwise the defense can come in and say, hey, we didn't have a chance to talk that person's deposition, you shouldn't let that person testify. You'll want to look at Rule 26 and make sure you include in your Rule 26 disclosures everything that you know of now that you might want to use, and you want to make sure you supplement those disclosures.

I'm going to enter a scheduling order, and that will be sent to you so you'll have that in writing, and it's going to include dates by which each phase of discovery has to be completed. The whole thing is going to be completed in six

months, which is September 15th. So I'm going to have deposition cutoff of August 15th and all discovery September 15. And I'm assuming no expert discovery.

Let me ask Mr. Clark to find a conference date in the second part of September.

And while he's doing that, let please alert the parties to a pet peeve of mine, and that is requests for discovery extensions that come on the eve of the cutoff, or worse yet, after the cutoff. I understand sometimes there's a good reason why you need an extension; your client's in a coma, all your documents got burned up in a fire. Whatever it is. If you have a good reason and you bring it to my attention when you know about it, I will be reasonable and you will get your extension. But if I get a letter a week before the discovery cutoff saying, you know, we haven't been able to arrange depositions, that's going to tell me you haven't been paying attention to the case, and in that event, I've been known to say no.

You'll see that my scheduling order contains a procedure you should follow if the other side is not playing ball discovery wise. Same rule applies if it's a third party is not playing ball discovery wise. It requires you to bring any disputes to my attention on a fairly tight timeline, and that's because I want to get you involved and keep you on track.

So if you come in at the next conference and say, well, we couldn't proceed because we have a discovery issue, I'm going to say, well, you should have brought it to my attention sooner than this, you're out of luck.

I mention this not because I'm expecting any problems. I say it whenever I enter a scheduling order just so the parties know I have a little bit of a thing about this issue and they know that they need to stay on top of the case. And they shouldn't expect an extension for the asking.

So let me see what Mr. Clark found for a conference date.

THE DEPUTY CLERK: Yes, Judge. September 29, 2022, at 11:30 a.m.

THE COURT: September 29 at 11:30 a.m.

If anybody is contemplating a motion at that time, let me have the pre-motion letter on September 13 and the response on the September 27 and we'll talk about it on -- actually, you know what, let me build in more time because the defendant is upstate. So September 8th for any pre-motion letter, response September 22, and we'll talk about it September the 29th.

The scheduling order will go to Ms. Hartofilis electronically later today and it will go by mail to Mr. Brown.

Anything else we should talk about this morning?

MR. BROWN: Yes, I see that you didn't mentioned page

30 in my brief.

THE COURT: I'm sorry?

MR. BROWN: You never mentioned page 30.

THE COURT: What about it?

MR. BROWN: I had underlined some stuff in there.

THE COURT: What is it that you think I overlooked?

MR. BROWN: It just said a statement that I thought was overlooked.

THE COURT: Let me pull up page 30 and see what you're talking about.

MR. BROWN: All right.

THE COURT: I mean, I read all your papers. Page 30 of your brief. Give me a second.

So the first thing you submitted was only five pages, so that's not it. Your opposition was ECF number 37. Your sur-reply was 39. Let me look at that. If that's what you're talking about -- no, that was only four pages.

Are you talking about your amended complaint?

MR. BROWN: Yes.

THE COURT: Oh, all right. Let me pull that up.

First amended complaint, page 30. That's a copy of your grievance. Yes, this relates to the deprivation of exercise claim which I ruled in your favor.

MR. BROWN: I understand that, but I was just bringing that to your attention because to my recollection

you're taking deliberate indifference under the Eighth Amendment means the prison official must know or disregard the excessiveness to an inmate. And I underline, I say, it is noted restraints are applied per DOCCS' policy, and every precaution is taken to make sure restraints are not compromised. That's foreseeable.

THE COURT: Well, and they screwed up this time, but there was no evidence it was deliberate as opposed to negligence.

MR. BROWN: Okay.

THE COURT: All right.

MR. BROWN: I've got another question.

THE COURT: Yes.

MR. BROWN: Does this bar me from filing the state claim?

THE COURT: Well, you've got to look at Corrections Law 24 which says you can't sue corrections officers for negligence or torts within the scope of their duty. You might be able to sue the State of New York, but you can't sue the corrections officers individually.

MR. BROWN: Okay.

THE COURT: I'm not saying you're able to sue the State of New York. If you were, it would be the Court of Claims. I just don't know offhand if that's true. But the individual officers are protected.

MR. BROWN: Okay.

THE COURT: All right. So discovery will commence. If you have no problems, I will talk to you again in the fall.

Everybody stay well.

MS. HARTOFILIS: Your Honor, can I have the name of the court reporter, I missed that at the beginning.

THE COURT: Yes, it's Angela O'Donnell and you can put in the request via the website.

MS. HARTOFILIS: Perfect.

MR. BROWN: Excuse me, Seibel.

THE COURT: Yes.

MR. BROWN: Yes. I got another thing. I will be home in June.

THE COURT: All right, well, when you get home, make sure you send a letter with your address and your phone number and email and all of that so we don't lose track of where you are.

MR. BROWN: All right.

THE COURT: Make sure you let Ms. Hartofilis know also. She may want to wait until you're released to take your deposition.

MR. BROWN: Okay. Have a blessed day.

THE COURT: You too. Bye, bye.

MR. BROWN: Bye.

MS. HARTOFILIS: Bye. Thank you, your Honor.

(Proceedings concluded)

CERTIFICATE: I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

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Angela A. O'Donnell, RPR, Official Court Reporter, USDC, SDNY